

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CHASOM BROWN, WILLIAM BYATT,  
JEREMY DAVIS, CHRISTOPHER CASTILLO,  
and MONIQUE TRUJILLO individually and on  
behalf of all other similarly situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No.: 4:20-cv-03664-YGR-SVK

**[PROPOSED] ORDER GRANTING  
PLAINTIFFS' *DAUBERT* MOTION  
AS TO GOOGLE EXPERT ON AMIR**

Judge: Hon. Yvonne Gonzalez Rogers

1 Before the Court is Plaintiffs’ motion to exclude opinions offered by Google’s survey expert,  
2 Professor On Amir. Having considered the parties’ papers filed in support of and in opposition to  
3 the Motion, argument by counsel, and all other matters properly considered by this Court, the Court  
4 **GRANTS** the Motion.

5 Amir’s April 15, 2022 expert report summarized the results of three surveys he conducted to  
6 “evaluate consumer understanding, perceptions, and expectations.” Amir Rep. ¶ 2. Relying on those  
7 surveys, Amir opines that some “respondents expect that Google receives” information while they  
8 are in Incognito mode. *Id.* ¶ 10. At class certification and summary judgment, Google relied on Amir  
9 and his surveys for just two purposes: (1) to argue that some class members were aware of Google’s  
10 collection of private browsing data and therefore impliedly consented to that practice (Dkt. 659 at 13-  
11 15) and (2) as extrinsic evidence to support Google’s interpretation of the disclosures (Dkt. 907-3 at  
12 14).

13 Plaintiffs’ Motion is granted because Amir’s Surveys are irrelevant to those issues in the  
14 upcoming trial. Having persuaded the Court that implied consent requires *individualized* inquiries,  
15 Google cannot assert that defense on a *classwide* basis to defeat the Rule 23(b)(2) classes’ claims.  
16 Dkt. 803 at 32. Nor may Google rely on the Surveys to raise an implied consent defense against the  
17 Plaintiffs’ individual damages claims because Google has already argued that implied consent  
18 requires “*individualized* examinations.” Dkt. 659 at 13-15 (emphasis added). As for express consent,  
19 in light of Google’s summary judgment argument that its disclosures are unambiguous, Google may  
20 “not rely[] on extrinsic evidence [like the Amir Surveys] for the proposition that it explicitly disclosed  
21 the at-issue data collection.” Dkt. 969 at 13 n.15. The Amir Surveys are now excluded because they  
22 “would not aid the jury to determine a fact in issue.” *Brewer v. Gen. Nutrition Corp.*, 2015 WL  
23 9460198, at \*4 (N.D. Cal. Dec. 28, 2015) (Gonzalez Rogers, J.).

24 Even if the Amir Surveys were relevant to an issue being tried, they would still be excluded  
25 because Amir did not ask his respondents about the “specific practice” being challenged.” *Campbell*  
26 *v. Facebook Inc.*, 77 F. Supp. 3d 836, 848 (N.D. Cal. 2014). As this Court explained in its summary  
27 judgment order, “consent is only effective if the person alleging harm consented ‘to the *particular*  
28 *conduct*, or to substantially the same conduct’ and if the alleged tortfeasor did not exceed the scope

1 of that consent.” Dkt. 969 at 13 (emphasis added) (citing Restatement (Second) of Torts § 892A).  
2 The “particular conduct” challenged in this case is Google’s collection of private browsing data when  
3 users are (1) signed-out of their Google accounts, and (2) visiting a non-Google website. Yet Amir  
4 did not ask about either of those scenarios. To the contrary, Amir used fact patterns to prime  
5 respondents to consider browsing on Google-owned websites, like “online research” (Google Search)  
6 and “watching a video” (YouTube). Amir Rep. tbl. 5; *id.* tbl. 10. Accordingly, there is no way to  
7 distinguish (i) respondents who were acknowledging that Google may collect Incognito data when  
8 people visit Google.com and/or sign in to Google accounts from (ii) any respondents who knew about  
9 the specific, at-issue data collection—limited to ***signed-out*** private browsing on ***non***-Google  
10 websites. Amir’s Surveys should be excluded because they are not “sufficiently linked to the facts of  
11 this case.” *Shalaby v. Irwin Indus. Toll Co.*, 2009 WL 7452756, at \*11 (S.D. Cal. July 28, 2009)  
12 (excluding expert testimony).

13 For these reasons, the Court now excludes Opinions 2-4 of Amir’s April 15, 2022 expert  
14 report—paragraphs 3-16 and 49-86. Google and Professor Amir may not rely on the three surveys  
15 for any purpose.

16  
17 **IT IS SO ORDERED.**

18  
19 DATED: \_\_\_\_\_

20 HON. YVONNE GONZALEZ ROGERS  
21 United States District Judge  
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